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Cases:

United States v. Sullivan, 332 U. S. 689
United States v. Fred Urbeteit, No. 577, this Term

Statute:

Federal Food, Drug, and Cosmetic Act of June 25, 1938,
c. 675, 52 Stat. 1040, 21 U. S. C. 301, *et seq.*:
Sec. 201 (m)
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Sec. 502 (a)

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Rule 7 (a) Federal Rules of Criminal Procedure

(1)

In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 645

LELORD KORDEL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the circuit court of appeals (R. 461-467) is reported at 164 F. 2d 913. The opinion of the district court (R. 440-443) is reported at 66 F. Supp. 538.

JURISDICTION

The judgment of the circuit court of appeals was entered November 6, 1947 (R. 468), and a petition for rehearing was denied January 22, 1948 (R. 474). On February 16, 1948, Mr. Justice Murphy extended the time for filing a petition for a writ of certiorari to and including

March 15, 1948 (R. 480). The petition was filed March 5, 1948. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

The principal questions presented are:

1. Whether pamphlets and circulars claiming therapeutic values and containing instructions for use of drugs shipped in interstate commerce are printed or graphic matter "accompanying" the drugs, and thus constitute "labeling" within the meaning of Section 201 (m) of the Federal Food, Drug and Cosmetic Act, where the literature was shipped separately from the drugs but was supplied to the consignees for the purpose of furnishing additional information to prospective consumers concerning the usefulness of the drugs in curing disease.

2. Whether petitioner should have been prosecuted by indictment rather than information.

STATUTE INVOLVED

The Federal Food, Drug, and Cosmetic Act of June 25, 1938, c. 675, 52 Stat. 1040 (21 U. S. C. 301, et seq.), provides in pertinent part:

SEC. 201. For the purposes of this Act—

* * * * *

(m) The term "labeling" means all labels and other written, printed, or graphic

matter (1) upon any article or any of its containers or wrappers, or (2) accompanying such article.

SEC. 301. The following acts and the causing thereof are hereby prohibited:

(a) The introduction or delivery, for introduction into interstate commerce of any food, drug, device, or cosmetic that is adulterated or misbranded.

SEC. 303. (a) Any person who violates any of the provisions of section 301 shall be guilty of a misdemeanor and shall on conviction thereof be subject to imprisonment for not more than one year, or a fine of not more than \$1,000, or both such imprisonment and fine; but if the violation is committed after a conviction of such person under this section has become final such person shall be subject to imprisonment for not more than three years, or a fine of not more than \$10,000, or both such imprisonment and fine.

(b) Notwithstanding the provisions of subsection (a) of this section, in case of a violation of any of the provisions of section 301, with intent to defraud or mislead, the penalty shall be imprisonment for not more than three years, or a fine of not more than \$10,000, or both such imprisonment and fine.

SEC. 502. A drug or device shall be deemed to be misbranded—(a) If its labeling is false or misleading in any particular.

STATEMENT

Three informations containing a total of 20 counts charging violations of Section 301 (a) of the Federal Food, Drug, and Cosmetic Act were filed against petitioner in the District Court for the Northern District of Illinois (R. 3-9, 19-37, 49-106).¹ Each count alleged that on a specified date petitioner shipped in interstate commerce a consignment of drugs to a named consignee; that certain literature accompanied the drug; and that the drug was misbranded within the meaning of the Act in that the statements in the accompanying literature were false and misleading.

The informations were consolidated for trial (R. 119) before the court, a jury having been waived (R. 124). The parties stipulated the facts showing that petitioner shipped the drugs in question in interstate commerce to the consignees named in the informations (R. 432-439). The nature of the evidence as to each count is illustrated by the following summary of the evidence in respect of the charge in the first information, 45 Cr. 488 (R. 3-9):

Petitioner writes and lectures on health foods on the basis of information obtained from reading books in his private library and in libraries throughout the United States (R. 416-417).

¹ One Laura Kordel was also charged as a codefendant in one of the informations (45 Cr. 488), but she was acquitted (R. 444).

Since January 1941, he has been marketing his own health food products (R. 417). In November 1943, he shipped from Chicago, Illinois, a quantity of a drug called "Gotu Kola" to a health food concern in Cincinnati, Ohio, and the shipment was received by the consignee. Six months earlier, in May 1943, he caused to be shipped to the same consignee thousands (R. 162) of circulars entitled, "Does this Exotic Plant From Ceylon Hold the Answer to Man's Search for the Secret of 'Rejuvenation'?" (R. 432.)² The labels affixed to the containers of the drug bore no statements as to the purposes for which the drug was intended to be used, declaring only that it was intended as a dietary supplement for experimental use and that the need in human nutrition of the principal ingredient had not been established (see R. 4). The circulars, however, represented and suggested the use for the drug (see R. 4-7). The circulars were designed for mailing and some appear to have been mailed to prospective customers (R. 161, 167). Others were placed in open view throughout the consignee's health food store, near petitioner's product and were available to anyone who came into the store (R. 166-167). An expert medical witness testified in detail concerning the statements in the circular, and he stated that they were totally false (R. 380-397). He character-

² The pertinent portions of the text of the circular are set forth in the information (R. 5-7).

ized various statements as "fantastic" and "untrue" (R. 390); as "reprehensible and artistic lying" (R. 392); as "perfect stupidity" and "misleading" (R. 393); as "false" (R. 394); and "interesting fiction" (R. 395); and as "really dangerous to the public and individual health" (R. 396).

Petitioner was convicted on each of the twenty counts and he was sentenced to pay a fine of \$200 on each count (R. 444-446). Upon appeal to the Circuit Court of Appeals for the Seventh Circuit, the judgments were affirmed (R. 468).

ARGUMENT

1. The principal question presented by the petition for a writ of certiorari—whether the circulars accompanied the drugs within the meaning of the Act—is presently before this Court on similar facts on our petition for a writ of certiorari in *United States v. Fred Urbeteit*, No. 577. In that case the Circuit Court of Appeals for the Fifth Circuit held that the product and such literature must accompany each other in a physical sense and thus adopted a construction which is squarely in conflict with the decision below. Our views in support of the decision of the Seventh Circuit in this case and in opposition to the Fifth Circuit's position are fully set forth in the petition in the *Urbeteit* case. In view of the conflict of decisions, we join in the petition for a writ of certiorari in this case, limited to this question.

2. The other questions which petitioner raises are not substantial. There is no occasion to argue whether the Federal Food, Drug and Cosmetic Act should be strictly construed, as petitioner urges (Pet. 15). For as recently as the decision in *United States v. Sullivan*, 332 U. S. 689, decided January 19, 1948, this Court stated (pp. 693-4) in construing that Act:

Although criminal statutes must be so precise and unambiguous that the ordinary person can know how to avoid unlawful conduct, see *Kraus & Bros., Inc. v. United States*, 327 U. S. 614, 621-622, even in determining whether such statutes meet the test, they should be given their fair meaning in accord with the evident intent of Congress. *United States v. Raynor*, 302 U. S. 540, 552.

Similarly, it unquestionably was the burden of the prosecution to prove the commission of the offenses beyond a reasonable doubt, as petitioner suggests (Pet. 15). The court below held that "there can be no doubt of the sufficiency of the evidence to sustain the charge beyond a reasonable doubt" (R. 466). No one disputes the rule, and it is plain that it was adhered to in this case.

Finally, the contention (Pet. 15-16) that the prosecution should have been by indictment misconceives the nature of the offenses of which petitioner was convicted. Section 303, the penal section of the Act, provides that a violation of Section 301 shall be a misdemeanor punishable

by imprisonment for not more than one year, or a fine of not more than \$1,000, or both. If, however, the offense occurs after the defendant has previously been convicted of a similar offense or if the offense is committed with intent to defraud or mislead, it is punishable by imprisonment for not more than three years, or a fine of not more than \$10,000, or both. The informations did not charge either that the offenses were committed with intent to defraud or mislead or after a prior conviction of a similar offense. Instead, they alleged misdemeanors as described in Section 303 (a). Since these offenses were not punishable by imprisonment for a term exceeding one year or at hard labor, they were properly prosecuted by information. See Rule 7 (a) of the Federal Rules of Criminal Procedure.³

CONCLUSION

We respectfully submit that in view of the conflict of decisions on the question discussed in

³ The informations were filed prior to the effective date of the Rules; but Rule 7 (a) plainly restates the prior existing law. See the note of the advisory committee. Rule 7 (a) provides:

"Use of Indictment or Information.—An offense which may be punished by death shall be prosecuted by indictment. An offense which may be punished by imprisonment for a term exceeding one year or at hard labor shall be prosecuted by indictment or, if indictment is waived, it may be prosecuted by information. Any other offense may be prosecuted by indictment or by information. An information may be filed without leave of court."

point 1 of the Argument, *supra*, certiorari should be granted, limited to that question. Petitioner's other contentions raise no questions which require further review by this Court.

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APRIL 1948.